STATE OF MICHIGAN

COURT OF APPEALS

JOHNY G. SALMO, Plaintiff-Appellant,	UNPUBLISHED December 12, 2013
v	No. 310738 Wayne Circuit Court
MEMBERSELECT INSURANCE COMPANY, Defendant-Appellee.	LC No. 11-000615-CK

Before: K. F. KELLY, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right a final order granting defendant's motion for summary disposition in this breach of contract action. We affirm.

The trial court granted summary disposition to defendant because there was no factual dispute that plaintiff did not comply with the provision of his insurance policy that required him to submit a written, signed, and sworn proof of loss within 60 days of plaintiff's loss.[1] Plaintiff

[1] The policy states:

> In the event of property loss, you must:
>
> * * *
>
> 4. send to us within 60 days after loss, a Proof of Loss signed and sworn to by the insured person, including:
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> a. the time and cause of loss;
> b. the interest of insured persons and all others in the property;
> c. Actual Cash Value and amount of loss to the property;
> d. all encumbrances on the property;
> e. other policies covering the loss;
> f. changes in title, use, occupancy or possession of the property; and
> g. if required, any plans and specifications of the damaged buildings or fixtures[.]

argues that the trial court erred because defendant waived the proof of loss provision through its conduct.

The grant or denial of a summary disposition motion is reviewed de novo on appeal. *Walters v Nadell*, 481 Mich 377, 381; 751 NW2d 431 (2008). A motion for summary disposition under "MCR 2.116(C)(10) tests the factual sufficiency of the complaint . . . ." *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). This Court "review[s] a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.* "The moving party has the initial burden of supporting its position with documentary evidence, but once the moving party meets its burden, the burden shifts to the nonmoving party to establish that a genuine issue of disputed fact exists." *Peña v Ingham County Road Comm*, 255 Mich App 299, 310; 660 NW2d 351 (2003) (quotation marks and citation omitted). This Court may only consider "what was properly presented to the trial court before its decision on the motion." *Id.*[2]

As an initial matter, plaintiff has presented no legal authority to support his position that defendant waived the proof of loss requirement. In fact, plaintiff has cited only a single opinion[3] in his entire brief on appeal—a decision of this Court that was reversed on appeal by our Supreme Court. "We will not search for authority to sustain a party's position." *Patterson v Allegan Co Sheriff*, 199 Mich App 638, 640; 502 NW2d 368 (1993). "An appellant may not . . . give issues cursory treatment with little or no citation of supporting authority." *Houghton v Keller*, 256 Mich App 336, 339; 662 NW2d 854 (2003) (citations omitted). "An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Id.* at 339-340. As plaintiff has not supported his arguments with even a single citation to relevant legal authority, and has not cited to the record for any material assertions of fact, we consider the issues abandoned. See *id.*; *Patterson*, 199 Mich App at 640. Even on the merits, however, plaintiff is not entitled to relief.

Plaintiff did not present sufficient evidence to create a genuine issue of material fact regarding waiver of the proof of loss provision. "When interpreting insurance contracts,

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[2] While the issue of waiver was raised before the trial court in the pleadings, the trial court did not address or decide the issue at the motion hearing. "Although this issue was not decided below, a party 'should not be punished for the omission of the trial court.'" *Klooster v City of Charlevoix*, 488 Mich 289, 310; 795 NW2d 578 (2011), quoting *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994). We will review this issue because "it is an issue of law for which all the relevant facts are available." *Vushaj v Farm Bureau Gen Ins Co of Michigan*, 284 Mich App 513, 521; 773 NW2d 758 (2009).

[3] *DeFrain v State Farm Mut Ins Co*, 291 Mich App 713; 809 NW2d 601 (2011), rev'd 491 Mich 359 (2012). *DeFrain* is discussed later in this opinion.

standard contract laws apply." *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 206; 747 NW2d 811 (2008). As our Supreme Court has explained:

> [T]he principle of freedom to contract does not permit a party *unilaterally* to alter the original contract. Accordingly, mutuality is the centerpiece to waiving or modifying a contract, just as mutuality is the centerpiece to forming any contract.
>
> This mutuality requirement is satisfied where a waiver or modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to modify or waive the particular original contract. In cases where a party relies on a course of conduct to establish waiver or modification, the law of waiver directs our inquiry and the significance of written modification and anti-waiver provisions regarding the parties' intent is increased. [*Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364-365; 666 NW2d 251 (2003) (emphasis in original).]

Defendant's conduct here does not demonstrate waiver.

Plaintiff points to a statement contained in a May 15, 2009 letter to him from defendant's adjuster, stating that defendant would assist plaintiff in the inventory of his personal property and in estimating the damage to the structure of the home. The letter makes it clear that, at that time, defendant was still investigating the claim and had not determined whether to accept or reject the claim. The same letter also states that "all the conditions specified in the insurance policy are expressly reserved. . . . Those rights and defenses are not to be deemed waived in any way." Defendant's letter clearly reserved all rights and defenses under the policy, including the proof of loss provision. Thus, the May 15, 2009 letter provides no factual support for plaintiff's argument.

In further support of his waiver argument, plaintiff points to the fact that defendant's adjuster told plaintiff that he had enough information to evaluate the value of plaintiff's claim. This statement does not demonstrate waiver of the proof of loss provision because evaluating the value of the claim is not the only purpose served by the proof of loss requirement.

> The purpose of provisions in an insurance contract requiring the insured to give prompt notice is to allow the insurer to make a timely investigation in order to evaluate claims and to defend against fraudulent, invalid, or excessive claims. The filing of a proof of loss within sixty days allows the insurer to determine with certitude that the insured demands payment under the policy, the amount of the claim, and the question of its liability. [*Dellar v Frankenmuth Mut Ins Co*, 173 Mich App 138, 145-146; 433 NW2d 380 (1988) (citation omitted).]

Even assuming defendant had enough information to evaluate the *value* of the claim, defendant had many other interests to protect through the proof of loss requirement. The proof of loss would assist defendant in determining questions of liability, including issues of fraud or whether the claim was excessive. *Id*. A statement that defendant had enough information to determine

the value of a claim does not lead to a conclusion that defendant voluntarily relinquished a known right, as defendant had other interests to protect through the proof of loss requirement.

Plaintiff argues that, because his unsigned proof of loss form was never expressly rejected, defendant waived the proof of loss requirement. However, "[m]ere knowing silence generally cannot constitute waiver." *Quality Products & Concepts Co*, 469 Mich at 365. Further, this fact is not indicative of waiver, as nothing in defendant's actions is inconsistent with defendant's right to deny liability. See *Dailey v Mid-States Ins Co*, 321 Mich 438, 441; 32 NW2d 698 (1948) (finding no waiver because no communication by the insurer to the insured was inconsistent with the proof of loss requirement; insurer wrote letter to insured denying claim 25 days after the proof of loss period expired).

Plaintiff believes defendant's rejection of his signed proof of loss indicates waiver because the letter provided him an additional 30 days to correct and return the proof of loss. In its letter dated December 2, 2009, defendant rejected plaintiff's signed proof of loss and included the rejected document for plaintiff's "review and correction." Defendant asked that "[a]ny documentation in support of further consideration [] be directed to [defendant's] attention within thirty (30) days of the date of this correspondence." At best, this can be understood as providing plaintiff an additional 30 days from the date of the letter, or until January 1, 2010, to provide a complete, signed, and sworn proof of loss. However, plaintiff has presented no evidence that he ever submitted a conforming proof of loss. The rejection letter also clearly states that defendant "does not, in any way, waive any rights or defenses, which it may have under the above cited policy, all of which rights and defenses, are expressly reserved." This statement can hardly be understood as a waiver of the right to enforce the proof of loss provision of the contract.

Plaintiff argues that, by paying for plaintiff's temporary housing for a period of four to six weeks in early 2010, defendant waived the proof of loss condition. This is not evidence of waiver. "'To constitute a waiver, there must be an *existing* right, benefit, or advantage, knowledge, actual or constructive, of the existence of such right, benefit, or advantage, and an actual intention to relinquish it, or such conduct as warrants an inference of relinquishment . . . .'" *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 564; 595 NW2d 176 (1999), quoting *Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716, 718; 179 NW2d 252 (1970) (emphasis added). Here, plaintiff had the obligation to provide a written proof of loss to defendant within 60 days of the loss. After the 60-day period expired, defendant's corresponding right to receive the proof of loss concluded, leaving only the question of the remedy for plaintiff's breach. Logically, whether defendant paid plaintiff's living expenses in 2010 has no relevance to the issue of waiver because there was no longer an existing right to waive. For the same reason, that defendant continued to investigate the claim in 2010 has no relevance to the issue of waiver.

It is undisputed that plaintiff did not submit a written, signed, and sworn proof of loss within 60 days of his loss as required by the policy. Plaintiff argues that he is still entitled to recover because defendant has not shown any prejudice caused by plaintiff's failure to comply with his obligations under the policy. "Clearly, the failure to file a signed and sworn proof of loss within sixty days of the loss bars recovery on a claim without regard to whether the insurer is prejudiced by such failure." *Dellar*, 173 Mich App at 145. Plaintiff argues that *DeFrain v State Farm Mut Ins Co*, 291 Mich App 713; 809 NW2d 601 (2011), rev'd 491 Mich 359 (2012),

warrants a different result here. In *DeFrain*, this Court held that an automobile insurer was required to show prejudice before refusing benefits on the basis of the insured's failure to comply with a notice provision. *DeFrain*, 291 Mich App at 718-719. However, this Court's decision was reversed by our Supreme Court when it held that "an unambiguous notice-of-claim provision setting forth a specified time within which notice must be provided is enforceable without a showing that the failure to comply with the provision prejudiced the insurer." *DeFrain v State Farm Mut Ins Co*, 491 Mich 359, 367-368; 817 NW2d 504 (2012). Plaintiff admits he did not comply with the proof of loss provision. Thus, plaintiff cannot recover. *DeFrain*, 491 Mich at 367-368; *Dellar*, 173 Mich App at 145.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Christopher M. Murray
/s/ Michael J. Riordan